No. 78-1913

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

ROBERT G. MYTNIK,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The preceding opinion of the Illinois Appellate Court has been previously submitted to this Court as an Appendix to the Petition for Writ of Certiorari and therefore is not contained in this brief in Opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has shown any reason for this Court to exercise its sound discretion to grant his Pètition for Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

Whether a trial court abuses its discretion when he sentences a defendant to six months imprisonment after that defendant is convicted of a crime for which the statute proscribes a sentence of imprisonment "for any term less than one year . . ."

STATEMENT OF THE CASE

The defendant was tried in a bench trial before Judge Calvin C. Campbell and was convicted on a charge of battery. A sentence of six months incarceration was imposed after trial and after a hearing on post-trial motions for a new trial and a reduction of sentence.

The Crime

Laura Spalla, a 12-year-old girl (R. 3), and her friend Erin O'Doheiety, 13 years old (R. 8), were sitting in Red's Grill at about 1:00 p.m. on July 6, 1977. (R. 9-10) The defendant, identified in court by both girls, was sitting in Red's at that time. (R. 10; R. 5) The girls testified that during the time they were sitting in Red's, the defendant was making noises at them, trying to gain their attention, and winking at them whenever they did acknowledge him. (R. 10) For the most part the girls tried to ignore him. (R. 10)

Laura and Erin left Red's, and went to a drugstore across the street, where they stayed only five minutes. (R. 11) They then went past Red's and walked down Artesian. (R. 11) Erin stopped at the corner of 119th Street and Artesian (R. 11) while Laura continued on south down Artesian. (R. 11)

The defendant drove up to Laura and asked here where she was going. (R. 5) The young girl asked the defendant why

he wanted to know, and he answered by inquiring whether she needed a ride. (R. 5) Laura replied "no" and the defendant asked her for directions. (R. 5) Laura started walking when the defendant, now out of his car, came up and pulled the girl's arm, grabbing her from the back. (R. 5-6)

Erin, who had stopped to pet a dog, heard Laura yell "no." (R. 11) She turned, and saw the defendant pulling her friend Laura to his car. (R. 11) Erin ran up and jumped on the defendant's back. (R. 11) He let go of Laura, and Erin slid down his back. (R. 12) The defendant turned around and grabbed Erin's arm, in response to which she bent his hand back. (R. 13)

While the defendant held on to Erin, Laura went back to him and started pinching his arms (R. 7) while he began pulling Laura again. (R. 13) At that point the defendant let go of the girls, said "okay girls," got into his car and drove off, northbound on Artesian. (R. 13; R. 7)

Laura took down the license number of the defendant's car as it drove away. (R. 7) The girls went to the nearby park and told a policeman there what had happened from the time they were at Red's. (R. 13)

On cross-examination, defense counsel asked Erin if she had discussed the incident with Laura, to which she replied "Sometimes." (R. 16) Counsel then asked her how many times she had talked about it. (R. 17) This question was objected to, the prosecutor noting its ambiguity by stating "She talked to the police, her mother and me too." (R. 17) The objection was sustained, and counsel abandoned any further cross-examination of the witness. (R. 17)

Officer William Town testified that he spoke with Laura Spalla at 1:00 p.m. on July 7th. (R. 18) Subsequently a license check was made of the plate number which Laura had noted on the defendant's car, and it was discovered that the car with that license was registered to a company. (R. 18) Town contacted

this company and informed them that one of their company cars had been used in an incident. (R. 19) After a check, the company called Town back and told him the man who had been driving that car would come to the police station. (R. 19)

After having been advised of his rights, the defendant told Town that he was in fact in the area of the incident the previous day. (R. 20) He admitted that he had seen the girls at Red's on the 6th and that he was on company business at the time. (R. 23-24) He stated, however, that he never got out of his car and never touched the girls. (R. 24) The two girls later identified the defendant after seeing him at the station. (R. 21)

The defendant testified that on July 6th, he was employed at the Zurich Insurance Company, driving a company car, a yellow Chevrolet. (R. 25) At 1:00 p.m. on that day, he was in Red's Grill, at the corner of Western and 111th Street. (R. 26) He had gone in and ordered two sandwiches when he saw about five young girls giggling and laughing at another table. (R. 26) They looked at him and smiled, and he smiled back at them. (R. 26) The girls then left. (R. 26) The defendant testified that he did not try to attract their attention, nor did he make noises at them. (R. 27) He got into his car and drove around the block when he saw the girls between 111th and 112th Streets on Artesian, walking south. (R. 27) At that time, there were only two girls. (R. 28)

The defendant said he pulled his car over and asked them "if they wanted a ride some place." (R. 29) The defendant's car was in the middle of the street. (R. 30) The girls, standing on the sidewalk, said they did not want a ride, and it was the defendant's testimony that he then just proceeded on. (R. 30) He stated that he never got out of his car, never approached the girls, and never bothered them. (R. 30) Further, he said that he was contacted by his boss the next day concerning this incident; that he went to the police station; and that he told the police officer exactly that to which he had testified. (R. 31-32)

Although the defendant was driving north when he saw the girls, who were walking south, and the defendant at the time was on company business, he was able to give no reason why he was going to change his direction to give them a ride south. (R. 33) The defense rested with the defendant's testimony.

In closing argument, the prosecutor stated:

> I wonder what would of (sic) happened if Laura had been out there all by herself that day . . . (R. 39)

The Court, after hearing all of the evidence, found the defendant guilty, stating:

> The court does not view this as a laughing matter. The court views this matter as a very serious charge. It is not clear to the Court as to why a thirty-nine-year-old man would stop two young ladies who he did not know and ask to give them a ride.
>
> The State has proven the burden that it is obligated to prove and there will be a finding of guilty. (R. 39)

The State asked for a sentence of one year imprisonment, noting the type of offense and the ages of the girls. (R. 40) Emphasizing in mitigation his military record, his family, employment, and the absence of any prior arrests, the defendant asked for supervision. (R. 40-41) A sentence of one year was imposed (R. 41), and was later reduced to six months (R. 70).

REASONS FOR DENYING THE WRIT

WHERE THE PETITIONER WAS CONVICTED OF BATTERY FOR HIS PHYSICAL ATTEMPT TO FORCIBLY DRAG A TWELVE-YEAR-OLD GIRL INTO HIS CAR AGAINST HER WILL, THE SENTENCE OF SIX MONTHS INCARCERATION, OR ONE-HALF OF THE STATUTORY MAXIMUM, WAS NOT AN ABUSE OF THE COURT'S DISCRETION. THIS IS PARTICULARLY TRUE WHERE THIS TWELVE-YEAR-OLD GIRL HAS SUFFERED NIGHTMARES AND NERVOUSNESS AS A RESULT OF THE UNPROVOKED ATTACK.

It is fundamental that a sentence imposed by a trial judge, if within statutory limits, is generally not subject to review. This legal concept is true in both the federal courts, United States v. *Tucker*, 404 U.S. 443 (1972), and the courts of Illinois, *People* v. *Perruquet*, 68 Ill. 2d 149 (1977).

In this case the defendant requests this Court to exercise its discretionary power of certiorari to review a simple sentencing situation. Defendant argues that the trial judge in this case based the six-month jail sentence, in part, upon statements made by the People's attorney. Simply stated, the defendant ignores the record in this case.

The defendant claims that the sentence of six months incarceration, one-half of the statutory maximum, was excessive. It is the position of the People that this sentence was not excessive, given the nature of this attempt to drag a 12-year-old girl into the car of a 39-year-old man when she would not voluntarily consent to ride with him, where the victim was saved only by the presence of her friend, and where she has suffered nightmares and nervousness since the attack; and the sentence was well within the trial court's discretion.

As the Supreme Court of Illinois has held in *People* v. *Perruquet*, 68 Ill. 2d 149, 368 N.E.2d 882 (1977), sentences will not be reduced by a reviewing court absent a showing of

clear abuse of discretion. Here, where the sentence imposed on the defendant was within the statutory range, indeed, only one-half of the maximum, there is clearly no such abuse of discretion.

The defendant makes much of his impeccable record, his steady employment, and his family. Unquestionably, these factors were before the judge and considered by him. But while the defendant may choose to ignore the nature of his crime, an unprovoked attack on a 12-year-old girl, indeed, an attempt to physically and forcibly force her into his car against her explicit refusal to do so, neither the People nor the court below nor this court can so ignore these facts which render this crime particularly disturbing. The trial judge was fully justified in noting the severity of the offense and the dangers it posed. As the prosecutor pointed out:

> The State would be asking for a period on one year in the House of Corrections because of the type of offense and because of the ages of the girls. There was absolutely nothing to provoke the incident. (R. 40)

And later, in direct reference to defense counsel's argument in mitigation regarding the defendant's family:

> Counsel, another thing that occurred to me is that the defendant has two children. One ten years and one twelve years of age. He did not indicate if they were male or female, but I certainly wonder if someone offered to give these two children a ride, under the circumstances, I do not think the sympathy warrants in this particular instance. (R. 41)

The defendant is perfectly correct in setting out those factors which the judge must take into account in passing sentence. What the defendant fails to note sufficiently is that the trial judge sat through the trial, heard the evidence, saw the witnesses, and was in the best position to assess the seriousness of the offense in light of all of the aggravating and mitigating

factors. As the court below concluded, "The Court does not view this as a laughing matter. The Court views this matter as a very serious charge." (R. 39)

Indeed, a review of the testimony and arguments made on the motion for a reduction of sentence demonstrates that, while the trial court had before it and considered all matters in mitigation, the defendant argued for a reduction on an incomplete, misleading basis. "To talk about deterrents, Your Honor. This man has certainly been deterred from the idea of trying to offer a ride to a girl by what happened to him." (R. 18) The defendant, however, was not convicted of offering a ride to a girl, but of physically trying to force a 12-year-old girl to 'ride' with him against her explicit wish. Has he been deterred from that? Defense counsel had nothing to say on this.

Defendant makes much of the fact that the trial judge gave thought to what might have happened had the victim been alone when she was attacked by the defendant. The judge, however, was most careful to point out that the above "was not a part of the case." (R. 26) This statement alone shows that the judge confined himself to relevant matters when he sentenced the defendant.[1]

Even further, the sentence was originally set at one year. However, the defendant produced testimony underlining the

[1] The defendant cites cases where sentences for battery were reduced on review. Suffice it to say that none of those cases involved an unprovoked attack on a 12 year old girl, nor an attack of such questionable and thus frightening motive. Further, those cases cite the absence of injury. The People submit that the defendant's attack on Laura Spalla has left permanent, scarring injury. As the victim's mother told the court:

> I just wanted to say because of this incident, my daughter has had nightmares. She thinks every man she sees whether she is walking through her own park in her own neighborhood, has an alterior (sic) motive. I think it has made her afraid when she shouldn't of (sic) been. (R. 65)

economic dependence of the defendant's family on him. The judge reduced the sentence to six months.

> The Court is concerned about the matter of the sentence and particularly not so much for the sympathy of the defendant, but for the family that is left.
>
> In this respect, the Court imposed a one year sentence on the defendant. The Court was of the opinion that the defendant should spend some time in the House of Correction. . . .
>
> Because of the economic matters that are involved here, the Court will reduce the sentence to six months. . . . This is not for the benefit of the defendant. . . . The Court is not impressed that he should be released, and the Court is not prepared to release the defendant alone. (R. 70-71)

From all of the above, it is clear that the court took all matters into consideration, found the defendant's crime to be a very serious one, and then fairly, in exercise of the soundest judicial discretion, sentenced the defendant to six months. There can be found no such flagrant abuse of discretion in this sentence to warrant this Court to entertain this case on certiorari.

CONCLUSION

For the foregoing reasons, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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